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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KIMBERLY KEMPTON et al., Plaintiffs and Appellants, v. CAROLYN COOPER, Defendant and Respondent.	B210114 (Los Angeles County Super. Ct. No. BC354136)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth Grimes, Judge. Affirmed.

Charles G. Kinney for Plaintiff and Appellant Kimberly Kempton.

Charles G. Kinney, in pro. per., for Plaintiff and Appellant Charles G. Kinney.

Borton Petrini, Matthew J. Trostler; Plotkin Marutani & Kaufman, Jay J. Plotkin, Nancy O. Marutani; Hosp, Gilbert, Bergsten & Phillips and Monte D. Richard for Defendant and Respondent.

Appellants Kimberly Kempton and Charles Kinney ("appellants") appeal from the trial court's post-trial order denying their motion to strike or tax costs requested by defendant Carolyn Cooper ("Cooper"). As discussed below, we are not persuaded by appellants' arguments and we affirm.

Background

1. Factual Background[1]

Appellants and Cooper own residential property next to each other in the Silverlake neighborhood of Los Angeles. Cooper lived there for approximately 20 years before appellants bought their property. During the time before appellants purchased their property, and with the consent of her then-neighbor Michelle Clark, Cooper built a wall running between her property and Ms. Clark's property. Cooper had also built a wall and planted trees along the back of her property (referred to as the "CLT fence").

Before appellants purchased the property from Ms. Clark, Ms. Clark informed appellants that she had consented to the wall Cooper built between the two properties. After buying the property from Ms. Clark, appellants commissioned a survey of their newly-purchased property. Appellants concluded that the wall Cooper had built along the boundary of the two properties extended approximately 17 inches onto appellants' property in a triangular fashion, for a total encroachment of 46 square feet (referred to as the "disputed strip of land"). Appellants also became disgruntled because the CLT fence allegedly impeded their view when exiting their garage, although it did not encroach onto their property.

2. Trial and Appeal on the Merits

Appellants eventually sued Cooper alleging that (1) the wall running between the two properties encroached onto appellants' property, (2) the CLT fence was a nuisance,

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[1] We provide only an abbreviated version of the background facts. A more detailed version can be found in our June 4, 2009 opinion addressing the merits of this appeal. (*Kempton v. Cooper* (June 4, 2009, B208943) [nonpub.opn.].)

and (3) Cooper committed trespass when she removed survey stakes left on her property by appellants' surveyors. Appellants sought to quiet title to the disputed strip of land, an injunction requiring Cooper to remove both the wall and the CLT fence, and damages.

Cooper filed a cross-complaint against appellants. Cooper sought to quiet title to the disputed strip of land or, in the alternative, a judicial declaration that she held an easement or other equitable interest across the disputed strip of land. Appellants then filed a cross-complaint against Cooper and Ms. Clark,[2] seeking a declaration that appellants had an equitable right to remove the wall running between the two properties.

Appellants' claims for trespass and nuisance were tried to a jury. On the trespass claim, the jury found Cooper's conduct was not a substantial factor in causing appellants' harm. On the nuisance claims, the jury found Cooper did not create a condition that unlawfully obstructed free passage or use of a public street and that appellants did not own the property on which they claimed the nuisance existed. The parties' equitable claims were tried to the court. The court determined that Cooper owned the disputed

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[2] Cooper and Ms. Clark were not the only targets of appellants' litigious attitude. In a separate action, appellants sued the City of Los Angeles, claiming the CLT fence diminished their sightlines when entering and exiting their garage and prevented pedestrian access along the road at the back of the two properties. (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344.) In that action, appellants sought monetary damages and an injunction requiring the City to force Cooper to remove the CLT fence. As noted in our June 4, 2009 opinion in this case, Division Four reversed the trial court's order granting the City's motion for judgment on the pleadings in that case. Division Four held only that appellants had sufficiently alleged a cause of action for public nuisance. Contrary to appellants' repeated statements before this court, Division Four did not rule in favor of appellants on the merits. Division Four expressly stated that nothing in its opinion "should be construed as proof of fact for purposes of later proceedings." (*Id.* at p. 1347, fn. 1.)

Appellants request judicial notice of Division Four's opinion in *Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344 as well as this Court's unpublished opinion in *Kempton v. Clark*, Case No. B200893 (appellants' unsuccessful appeal from dismissal of their cross-complaint against Ms. Clark). We deny appellants' requests for judicial notice as they are not properly before us. (See Cal. Rules of Court, rule 8.252(a).) We note, however, that judicial notice is not necessary for published opinions or an unpublished opinion in the same case. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46, fn. 9; Cal. Rules of Court, rule 8.1115(b).)

strip of land under the "agreed boundary" doctrine and quieted title to that land in Cooper's favor. In the alternative, the trial court held that Cooper possessed an express prescriptive easement for her exclusive use and enjoyment of the disputed strip of land and the wall; Cooper had an irrevocable license to use the disputed strip of land and to maintain the wall; and Cooper had an equitable easement to preserve the wall and to use the disputed strip of land.

Following the jury and court trials, the trial court in effect reopened the court trial to hear evidence on the issue of a metes and bounds description of the disputed strip of land. Both sides presented expert testimony to support their proposed metes and bounds description. The trial court permitted Cooper to amend her cross-complaint to include a metes and bounds description of the disputed strip of land.

In its final judgment, the trial court granted title to the disputed strip of land to Cooper and enjoined appellants from interfering with her use and enjoyment of the disputed strip of land and her maintenance and repair of the wall. The trial court also concluded that Cooper owned the land upon which the CLT fence stood, subject to an easement by the City, and that she did not have to reconfigure the CLT fence unless the City requested that she do so. Appellants appealed from the judgment (the "prior appeal"). On June 4, 2009, we issued an unpublished opinion affirming the judgment in its entirety.

3. Post-Trial Proceedings and Appeal on Motion to Strike or Tax Costs

While the prior appeal was pending, the trial court heard appellants' post-trial motion to strike or tax Cooper's costs. Appellants argued that Cooper's memorandum of costs (which sought a total of $37,045.02 in costs) requested improper fees and costs. Appellants also claimed Cooper could not recover costs under section 998 of the Code of Civil Procedure ("section 998") because, although Cooper had made 998 offers to both Kempton and Kinney, her 998 offers failed to satisfy the requirements of that section. Cooper's 998 offers were identical except that one was directed to Kempton and the other was directed to Kinney. In essence, Cooper offered to pay Kempton and Kinney each $7,500 (for a total of $15,000) in exchange for appellants' dismissal with prejudice of

their complaint and cross-complaint and their execution of a release of claims arising out of the subject of their complaint and cross-complaint.

Cooper's 998 offers stated: "Defendant/Cross-Defendant CAROLYN COOPER, individually and as Trustee of a 2004 CAROLYN E. COOPER Revocable Trust dated March 17, 2004 (hereinafter referred to as 'Defendant') offers to settle and compromise the above-entitled action, including any and all liens or claims of lien arising out of the incident which is the subject of said action, by Defendant's payment to [Kempton/Kinney] of the total sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500.00) in exchange for plaintiff's delivery as hereinafter provided of a properly executed Request for Dismissal with prejudice of plaintiff's complaint and cross-complaint, and by execution and delivery to counsel for Defendant of a Release of All Claims as to this Defendant. [¶] Each party shall bear its own costs in said action. Plaintiff may accept this offer by mailing or delivering to counsel for Defendant a written notice of acceptance of this offer, together with the properly executed Request for Dismissal, with prejudice, within thirty (30) days from the date of service of this offer to compromise as indicated on the proof of service attached hereto or prior to the first day of trial, whichever comes first. [¶] Defendant will deliver the settlement funds to plaintiff within thirty (30) days following receipt of the aforesaid Request for Dismissal and Release of All Claims. [¶] If this offer is not accepted as above stated, within thirty (30) days or prior to the first day of trial, whichever comes first, as required by section 998 of the Code of Civil Procedure, said offer is withdrawn. [¶] Defendant puts Plaintiff on notice that Defendant will request full payment for the services of any expert witnesses retained or used by Defendant for the purpose of trial necessitated by Plaintiff's failure or refusal to accept this offer of settlement as provided in Code of Civil Procedure section 998."

Appellants argued to the trial court that Cooper's 998 offers were invalid because they (1) were vague, incomplete and not made in good faith, (2) did not address or seek to resolve Cooper's cross-complaint against appellants, and (3) did not include a signature line, acceptance statement or acceptance document.

The trial court denied appellants' motion to strike or tax Cooper's costs and awarded Cooper the full $37,045.02 that she had requested. Appellants appeal.

Discussion

1. Notice of Appeal

Appellants filed their Notice of Appeal on August 14, 2008, purporting to appeal from an order entered on or about July 28, 2008. However, the only July 28, 2008 filings in the record are the minute order indicating the trial court denied appellants' Motion to Strike or Tax Costs and the Notice of Ruling indicating the same. Neither the minute order nor the notice of ruling is appealable. Appellants should have appealed from the Notice of Entry of Order, which was filed on August 20, 2008.

Because "[t]he notice of appeal must be liberally construed," we construe Appellants' appeal to be from the August 20, 2008 Notice of Entry of Order. (Cal. Rules of Court, rule 8.100(a)(2); see also *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202.) Thus, Appellants' August 14, 2008 Notice of Appeal is timely. (Cal. Rules of Court, rule 8.104(a).)

2. Cooper's Memorandum of Costs

As an initial matter, we reject appellants' contention that Cooper never filed her Memorandum of Costs. Because appellants did not raise this point in the trial court, they have waived it. (*Hepner v. Franchise Tax Board* (1997) 52 Cal.App.4th 1475, 1486.) In any event, the Clerk's Transcript in the prior appeal includes a copy of Cooper's Memorandum of Costs which the trial court has stamped as "received" on May 22, 2008.

3. Section 998 Offers

Section 998 provides that any party to an action "may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." (§ 998, subd. (b).) An offer under section 998 "shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.

Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." (*Ibid.*)

Section 998 also provides that "[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (§ 998, subd. (c)(1).)

In the absence of any conflicting extrinsic evidence, interpretation of a 998 offer is a question of law that we review de novo. (*Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 183.) "We apply general principles of contract law where those principles neither conflict with section 998 nor defeat its purpose." (*Ibid.*) "The issue of whether a section 998 offer is enforceable, and the application of section 998 to an undisputed set of facts, presents questions of law which we review de novo." (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 130 (*Westamerica Bank*).)

However, we review the trial court's determination of whether an offeree obtained a more favorable judgment for an abuse of discretion. The question is whether the rejecting offeree (here, Kempton and Kinney) obtained a judgment more favorable than the offer. That question is one for the trial court's discretion. (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 271.)

a. Cooper's cross-complaint against appellants

Appellants argue that Cooper's 998 offers are invalid because they did not resolve Cooper's cross-complaint against appellants. We disagree.

In *Westamerica Bank*, the court held that a defendant's 998 offer to settle claims raised in the plaintiff's complaint—but not claims raised by the defendant in a cross-complaint—"was valid to trigger the provisions of section 998, even though it would not have resulted in an appealable final judgment, because it was an offer to the other party in the separate and independent action of the amended complaint which would have allowed 'judgment to be taken.' (§ 998, subd. (b).)" (*Westamerica Bank, supra*, 158 Cal.App.4th at p. 114; see also *id.* at p. 135.) The court explained that a "'complaint and a cross-complaint are, for most purposes, treated as *independent actions*.' [Citations.] A cross-complaint is generally considered to be a separate action from that initiated by the complaint. [Citations.] . . . [¶] Where there are both a complaint and a cross-complaint there are actually two separate actions pending and the issues joined on the cross-complaint are completely severable from the issues under the original complaint and answer." (*Id.* at p. 134.) The court also explained that section 998 does not require a party to make an offer that resolves all aspects of the case. (*Id.* at p. 130.) As long as the offer would allow "judgment to be taken" and meets the other requirements of section 998, it is valid. Here, Cooper's 998 offers would have allowed a judgment of dismissal to be taken against both Kempton and Kinney on their complaint and cross-complaint.

Appellants attempt to distinguish *Westamerica Bank* on the ground that the complaint and cross-complaint there raised "totally different" claims while, here, Cooper's cross-complaint and appellants' complaint and cross-complaint raised "inter-related" issues. In *Westamerica Bank,* the complaint alleged claims relating to the defendants' default on a line of credit with the plaintiff bank. (*Westamerica Bank*, *supra*, 158 Cal.App.4th at p. 116.) The defendants cross-complained against the plaintiff bank alleging it had illegally refused to renew or extend the line of credit because one of the defendants was female. (*Id.* at pp. 116-117.) The defendants' cross-complaint raised various claims related to the alleged gender discrimination. (*Ibid.*) Thus, had the plaintiff accepted the defendants' 998 offer to settle the complaint (i.e., the line of credit default issues), judgment would have been entered on the complaint, but the defendants'

cross-complaint against the bank on the gender discrimination issues would have proceeded.

Appellants contend that, contrary to the pleadings in *Westamerica Bank*, the pleadings here raise "inter-related" issues. As such, appellants claim that Cooper's 998 offers are invalid because they do not resolve "inter-related" issues raised in her cross-complaint against appellants. Although appellants' complaint and Cooper's cross-complaint both sought to quiet title to the disputed strip of land, Cooper's 998 offers did not seek to *resolve* any quiet title claim in her favor or in appellants' favor. Rather, her 998 offers sought to *dismiss* appellants' claims. There was no need to specify property boundaries or other such details in light of what Cooper was offering—namely, money in exchange for dismissal. Title to the property at issue, including a detailed metes and bounds description, would still be (and was) decided on Cooper's cross-complaint.

Thus, although appellants assert that the issues raised in the various pleadings are so intertwined that Cooper's 998 offers would not have resolved all issues, we are not persuaded. We conclude that Cooper's 998 offers were not invalid for failure to address or resolve Cooper's cross-complaint.

b. Vagueness and unreasonableness

Appellants also argue that Cooper's 998 offers were vague, unreasonable and not in good faith and, therefore, void. Specifically, appellants claim the 998 offers improperly failed to resolve Cooper's cross-complaint or to provide a legal description of the property boundaries or easement rights. Again, we disagree.

Appellants are correct that 998 offers must be clear, reasonable and in good faith. (See *Westamerica Bank*, *supra*, 158 Cal.App.4th at p. 129; *Berg v. Darden* (2004) 120 Cal.App.4th 721, 727.) Appellants are incorrect, however, in arguing that Cooper's 998 offers were not clear, reasonable or in good faith. As explained above, because the 998 offers sought dismissal of appellants' complaint and cross-complaint (as opposed to a specific resolution of appellants' claims), it was not necessary for Cooper to provide the details appellants claim were missing. Rather, the offers unambiguously state that Cooper would pay a significant amount of money in exchange for the dismissal of

appellants' claims against her. We do not agree with appellants' characterization of Cooper's 998 offers as "token" offers or as attempts to "game the system." We conclude the 998 offers are clear, reasonable and in good faith.

c. More favorable result

Appellants dedicate much of their appellate briefs to an argument they did not make before the trial court—namely, that, despite judgment in Cooper's favor, appellants actually obtained a more favorable result by going to trial than they would have obtained had they accepted Cooper's 998 offers. We decline to review this fact-specific argument when appellants failed to give the trial court—who heard and decided many of the factual issues involved—the opportunity to address it. (*Hepner v. Franchise Tax Board*, *supra*, 52 Cal.App.4th at p. 1486.)

d. Expert fees relating to metes and bounds description

Appellants also argue the trial court erred in awarding expert witness fees that Cooper incurred in presenting a metes and bounds description for the final judgment. Appellants claim such fees were incurred "after trial" and, therefore, are not recoverable under section 998. In making this argument, appellants assert that, when the trial court re-opened the case to consider evidence on the metes and bounds description, the proceedings that followed did not qualify as a "trial" for purposes of section 998, subdivision (c)(1). We are not persuaded.

Section 998, subdivision (c)(1) provides in relevant part that the trial court "may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." The trial court in effect re-opened the trial to consider evidence of the metes and bounds description for inclusion in the final judgment. We conclude the trial court did not err in awarding Cooper her expert witness fees incurred for that purpose.

e. Method of acceptance

Finally, appellants argue the 998 offers are invalid because they did not include an "acceptance signature line, [an] acceptance statement, [or an] acceptance document of any kind." This argument is meritless.

Cooper complied with the requirements of section 998, including the requirement that a 998 offer include "a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer *or on a separate document of acceptance*, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party." (§ 998, subd. (b), italics added.) As this language (especially the italicized language) makes clear, the 998 offer itself need not include a space or attach a document for the offeree (here, Kempton and Kinney) to sign indicating acceptance of the offer. Rather, the 998 offer need only explain that the offeree must accept the offer by signing a statement, whether included in the offer itself or in a separate document, that the offer has been accepted. Cooper's 998 offers did just that. Each of her 998 offers stated "Plaintiff may accept this offer by mailing or delivering to counsel for Defendant a written notice of acceptance of this offer . . ."

Disposition

The order is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J. JOHNSON, J.